

Appendix B426-B500

R. ALAN MILLER

Page 246

16:34:19 1 Castle Pines, CliniCorp, US Wireless?
16:34:24 2 A. No, none of those.
16:34:29 3 Q. New America securities litigation?
16:34:42 4 A. No.
16:34:42 5 Q. Zelcor, American Dental, Shearson?
16:34:49 6 A. I can't recall.
16:34:50 7 Q. Alpha Group, Kenny or Mackinley?
16:34:59 8 Those are the other ones we talked about.
16:35:01 9 A. It wasn't Alpha Group. No, I don't
16:35:05 10 recall.
16:35:05 11 Q. But you do recall that AMF Bowling
16:35:08 12 was the other one?
16:35:09 13 A. Yes.
16:35:09 14 Q. The AMF report, which we'll mark in
16:35:19 15 a minute, was a model or a template for the section of
16:35:23 16 your report in this matter beginning with Paragraph 19
16:35:26 17 that dealt with the underwriters' due diligence; is
16:35:30 18 that correct?
16:35:30 19 MR. LEWIS: Objection to form and
16:35:32 20 foundation.
16:35:33 21 THE WITNESS: I don't know that I'd
16:35:35 22 put it quite as broadly. I think with
16:35:38 23 respect to the type of information that was
16:35:41 24 required by prospective underwriters, the
16:35:47 25 type of information relevant to that

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B426

R. ALAN MILLER

Page 247

16:35:50 1 examination, process issues as to how the
16:35:52 2 underwriter should go about the work, what
16:35:55 3 level of detail to obtain, factors that are
16:35:58 4 important in conducting the work. In those
16:36:04 5 source of factors, I used some of the
16:36:07 6 language which I also used in AMF Bowling as
16:36:11 7 it applied to this case but reviewing it to
16:36:14 8 make sure that it did apply to this case and
16:36:17 9 modifying it if necessary.

16:36:20 10 Again, some of the work here has
16:36:23 11 been generated over the years from reviewing
16:36:26 12 Mr. Haft's series, the due diligence and
16:36:32 13 securities transaction materials, and other
16:36:35 14 publications and materials that we get
16:36:38 15 regularly on due diligence issues.

16:36:43 16 MR. GLUCKOW: Let's mark your
16:36:45 17 initial report of AMF Bowling.

16:37:24 18 (Mr. Miller's AMF Report was marked
16:37:24 19 Exhibit-351 for identification.)

16:37:25 20 BY MR. GLUCKOW:

16:37:25 21 Q. Mr. Miller, you have 351, which is
16:37:27 22 your initial report in AMF. Do you recognize that as
16:37:32 23 your initial report in the AMF Bowling matter?

16:37:36 24 A. Yeah, it appears to be that.

16:37:37 25 Q. If you would, compare Paragraphs 19

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B427

R. ALAN MILLER

Page 248

16:37:40 1 and 20 from the Adams Golf initial report with
16:37:48 2 Paragraphs 6 and seven of the AMF Bowling report.
16:38:28 3 A. Right.
16:38:28 4 Q. They are very similar, correct?
16:38:30 5 A. Yeah, many of the bullet points are
16:38:33 6 the same. There are a couple that differ given the
16:38:36 7 differing nature of the two companies involved in
16:38:39 8 these two matters.
16:38:42 9 Q. The introductory language in 19 in
16:38:47 10 the Adams Golf report is the same as the introductory
16:38:50 11 language in six of the AMF report, correct?
16:39:02 12 A. Yes.
16:39:02 13 Q. The first bullet point is the same?
16:39:05 14 A. Right.
16:39:05 15 Q. The second bullet point is the same?
16:39:08 16 A. Yes.
16:39:10 17 Q. The third bullet point is the same?
16:39:12 18 A. Yes.
16:39:13 19 Q. The fourth bullet point is the same?
16:39:16 20 A. Yes.
16:39:16 21 Q. The fifth bullet point in Adams Golf
16:39:20 22 is new, correct?
16:39:25 23 A. Correct.
16:39:26 24 Q. Do you recall the process that led
16:39:28 25 to the adding of that bullet point and, specifically,

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B428

R. ALAN MILLER

Page 249

16:39:35 1 did you think to add that yourself or was that a
16:39:38 2 suggestion from counsel or someone else?
16:39:39 3 A. No, that was my input, and it
16:39:49 4 reflects the various -- the differing stages of the
16:39:52 5 two companies; that is, AMF Bowling was a more
16:39:55 6 established, longer term company and Adams was a new,
16:40:00 7 fast-growing company with comparatively inexperienced
16:40:06 8 management, particularly in the public company arena,
16:40:09 9 and with a rapidly evolving business plan, so it was
16:40:14 10 an appropriate one for Adams that didn't apply so much
16:40:17 11 to AMF.
16:40:18 12 Q. The next bullet point is the same,
16:40:18 13 correct?
16:40:22 14 A. Correct.
16:40:22 15 Q. The next one is the same after that?
16:40:26 16 A. Correct.
16:40:29 17 Q. Then the -- I think the report of
16:40:41 18 Gerard Adams I read somewhere was a typo in your AMF
16:40:46 19 report, so we'll ignore that one.
16:40:48 20 MR. LEWIS: Objection to form.
16:40:50 21 BY MR. GLUCKOW:
16:40:50 22 Q. The two paragraphs that follow the
16:40:52 23 list of bullet points --
16:40:56 24 A. Continuing through the bullet points
16:40:58 25 after you left off there, the next one is different,

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B429

R. ALAN MILLER

Page 250

16:41:04 1 the next one is different.
16:41:06 2 Q. Which one did you say was different?
16:41:08 3 A. The one that begins historical
16:41:13 4 financial performance and trends.
16:41:13 5 Q. The first sentence is the same,
16:41:15 6 correct?
16:41:15 7 A. The first sentence is the same. In
16:41:17 8 Adams, I've added a sentence that relates to Adams'
16:41:22 9 specific situation versus AMF's. The next bullet
16:41:26 10 point in the AMF does not appear in Adams, the next
16:41:31 11 bullet point is the same, and the report of Gerard
16:41:35 12 Adams we've talked about.
16:41:38 13 Q. The next paragraph which begins in
16:41:40 14 both reports with respect to each of is the same,
16:41:46 15 correct?
16:41:56 16 MR. LEWIS: Off the record.
16:41:56 17 (Discussion held off the record.)
16:41:56 18 (Recess.)
16:50:54 19 (Mr. Rozen leaves the deposition.)
16:50:54 20 BY MR. GLUCKOW:
16:51:29 21 Q. Mr. Miller, have you had a chance to
16:51:31 22 look at those paragraphs we were considering before
16:51:34 23 the break?
16:51:34 24 A. Yes.
16:51:35 25 Q. As best I can tell, they are the

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B430

R. ALAN MILLER

Page 251

16:51:37 1 same except in the paragraph that begins the proper
16:51:40 2 attitude in Adams Golf, instead of a period after
16:51:46 3 issuer, there's a comma, and then there's a clause
16:51:50 4 particularly with respect to a new company
16:51:51 5 experiencing substantial and rapid growth, which is
16:51:54 6 additional language in Adams Golf that's not in
16:51:58 7 AMF Bowling, correct?
16:51:59 8 A. Correct.
16:51:59 9 Q. Otherwise, they are the same,
16:51:59 10 correct?
16:52:01 11 A. Correct.
16:52:02 12 Q. In the AMF report, specifically in
16:52:08 13 Paragraph 9, you actually offer an opinion that the
16:52:15 14 due diligence investigation with respect to the public
16:52:19 15 offering was inadequate, correct?
16:52:24 16 MR. LEWIS: Objection to form; it
16:52:26 17 speaks for itself.
16:52:34 18 THE WITNESS: Yeah, in Paragraph 9
16:52:37 19 of AMF, yeah, I give the opinion that the due
16:52:40 20 diligence investigation and pricing analysis
16:52:45 21 conducted by the QIU was inadequate.
16:52:53 22 BY MR. GLUCKOW:
16:52:53 23 Q. Were you finished?
16:52:54 24 A. Yes.
16:52:54 25 Q. As we've discussed in the Adams Golf

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B431

R. ALAN MILLER

Page 252

16:52:59 1 report, in your initial report you did not offer any
16:53:03 2 opinion regarding the adequacy or the inadequacy of
16:53:06 3 the underwriters' due diligence and instead awaited
16:53:10 4 receipt of the defendants' information, correct?
16:53:12 5 MR. LEWIS: Objection to the form.
16:53:13 6 THE WITNESS: Yes, except with
16:53:15 7 respect to the disclosure and the prospectus
16:53:19 8 issue, which I do address in the initial
16:53:21 9 report in Adams Golf.
16:53:22 10 BY MR. GLUCKOW:
16:53:22 11 Q. You're referring to Paragraph 22 of
16:53:24 12 Adams Golf?
16:53:24 13 A. Yes.
16:53:24 14 Q. Just so I'm clear, that
16:53:27 15 Paragraph 22, which I recognize is your opinion, in
16:53:31 16 the initial report does not address the adequacy or
16:53:36 17 the inadequacy of the underwriters' due diligence
16:53:40 18 investigation, correct?
16:53:42 19 A. It doesn't address it separate from
16:53:45 20 the publication in the prospectus of the information
16:53:49 21 at issue; that's correct. Again, I discussed that
16:53:54 22 topic a few minutes ago before the break. It does not
16:53:59 23 discuss the investigation itself separate from the
16:54:03 24 publication in the Adams Golf Paragraph 22.
16:54:07 25 Q. I just have to make sure I

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B432

R. ALAN MILLER

Page 253

16:54:09 1 understand this correctly. Twenty-two is saying that
16:54:11 2 it's your opinion that the disclosure in the
16:54:13 3 prospectus was inadequate in the area of gray
16:54:17 4 marketing and the effect that might have on the
16:54:20 5 company, correct?
16:54:21 6 A. Right; right.
16:54:21 7 Q. There's nothing in 22 that addresses
16:54:23 8 -- or anywhere else in the initial report that
16:54:25 9 addresses whether the underwriters' due diligence
16:54:30 10 investigation was or was not adequate, correct?
16:54:33 11 MR. LEWIS: Objection to the form
16:54:34 12 and foundation.
16:54:36 13 THE WITNESS: There's nothing else
16:54:37 14 that addresses that; that's correct. Having
16:54:39 15 said that, I don't believe that you can, on a
16:54:43 16 practical basis, have an adequate and
16:54:47 17 reasonable underwriters' due diligence
16:54:50 18 investigation resulting in the nonpublication
16:54:52 19 in the prospectus of the information that's
16:54:56 20 at issue.
16:54:59 21 BY MR. GLUCKOW:
16:54:59 22 Q. Are you taking away the due
16:55:01 23 diligence defense from the underwriters? I'm not
16:55:04 24 following you.
16:55:04 25 MR. LEWIS: Objection to form.

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B433

R. ALAN MILLER

Page 254

16:55:06 1 THE WITNESS: I don't think so.
16:55:07 2 That is, if the underwriter performs a
16:55:13 3 reasonable and adequate due diligence
16:55:15 4 investigation and discovers a problem, and it
16:55:17 5 does not then put in the prospectus, or
16:55:20 6 insist be put in the prospectus, I don't
16:55:22 7 believe he has conducted his necessary
16:55:25 8 reasonable and adequate due diligence
16:55:28 9 investigation to afford him the defense. It
16:55:31 10 just doesn't make any sense that that would
16:55:33 11 be the case, so with respect to the
16:55:36 12 publication part of that function, my
16:55:40 13 Paragraph 22 addresses that. It does not
16:55:43 14 address separately whether or not the
16:55:45 15 investigation part of the function was
16:55:46 16 performed adequately or reasonably in this
16:55:50 17 case.
16:55:51 18 BY MR. GLUCKOW:
16:55:51 19 Q. Everything you just said is based on
16:55:55 20 what, because you're not a lawyer, right?
16:55:58 21 A. That's correct.
16:55:58 22 Q. You have no legal training, haven't
16:56:01 23 gone to law school?
16:56:03 24 A. I don't have legal training. I have
16:56:06 25 not gone to law school. I have obviously read the

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B434

R. ALAN MILLER

Page 255

16:56:10 1 Securities Act a number of times, read and reviewed
16:56:12 2 and attended PLI materials and that sort of thing, but
16:56:16 3 my expertise in the area is as I discussed before, in
16:56:20 4 the context of the investment banking and investment
16:56:23 5 community's understanding of these matters.

16:56:25 6 Q. I just want to make sure --

16:56:28 7 A. I also -- sorry -- further in that
16:56:31 8 area have reviewed case law and opinions and that sort
16:56:34 9 of thing in this area as well.

16:56:39 10 Q. I'm just going to do this
16:56:42 11 hypothetically to find out whether I can understand
16:56:45 12 what you are saying.

16:56:46 13 Assume that there's a prospectus
16:56:49 14 that's defective, it has a misstatement or an omission
16:56:53 15 in it, a material misstatement or omission, and also
16:56:55 16 assume that the underwriters have conducted a
16:56:57 17 reasonable due diligence investigation where they've
16:57:00 18 identified an issue, and they actually believe and
16:57:07 19 have reasonable grounds to believe that the
16:57:09 20 registration statement and prospectus are complete and
16:57:13 21 accurate, don't have any material misstatements, don't
16:57:17 22 omit any material facts; you do recognize, I take it,
16:57:20 23 that in that circumstance the underwriters are
16:57:23 24 entitled to a due diligence defense even if the
16:57:26 25 prospectus is defective, correct?

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B435

R. ALAN MILLER

Page 256

16:57:29 1 MR. LEWIS: Objection to form,
16:57:29 2 foundation, incomplete hypothetical,
16:57:29 3 argumentative.
16:57:33 4 BY MR. GLUCKOW:
16:57:33 5 Q. I'm not trying to be argumentative,
16:57:36 6 I'm just trying to understand.
16:57:39 7 A. I think not necessarily, I guess, is
16:57:41 8 the answer. I think that -- let me put it this way if
16:57:47 9 I can -- if I understand what you're asking, I believe
16:57:49 10 it is possible for underwriters to conduct a
16:57:52 11 reasonable and adequate due diligence investigation
16:57:56 12 and still be misled or defrauded in certain
16:58:03 13 circumstances, but I don't believe those circumstances
16:58:14 14 exist here, and at the time I prepared my initial
16:58:22 15 report I was prepared to say what I did in
16:58:24 16 Paragraph 22 but awaited the report of the defendants'
16:58:32 17 expert to see if they then established that they had
16:58:35 18 performed a reasonable and adequate due diligence
16:58:37 19 investigation, notwithstanding the omission from the
16:58:42 20 prospectus of what I considered to be material
16:58:45 21 information.
16:58:45 22 Q. Let's assume that the report that
16:58:49 23 you then received from the defendants established a
16:58:52 24 reasonable and adequate due diligence investigation.
16:58:56 25 Okay?

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B436

R. ALAN MILLER

Page 257

16:58:56 1 A. Right.
16:58:57 2 Q. You would then agree that the
16:58:59 3 underwriters could take advantage of their affirmative
16:59:04 4 defense, correct?
16:59:05 5 MR. LEWIS: Objection as to
16:59:09 6 foundation, incomplete hypothetical, vague
16:59:10 7 and indeterminate.
16:59:12 8 THE WITNESS: Yeah, if I understand
16:59:13 9 your question correctly, I think that's a
16:59:18 10 possibility.
16:59:18 11 BY MR. GLUCKOW:
16:59:18 12 Q. They could still be entitled to
16:59:20 13 their due diligence defense, notwithstanding your
16:59:24 14 opinion in 22 that there was a problem with the
16:59:27 15 prospectus, correct?
16:59:28 16 MR. LEWIS: Objection to form.
16:59:29 17 THE WITNESS: I think that that is
16:59:30 18 possible, yes.
16:59:32 19 BY MR. GLUCKOW:
16:59:32 20 Q. We may have to come back to that
16:59:38 21 later but let's leave it there for now.
16:59:44 22 A. Just to be clear, I view that as a
16:59:47 23 hypothetical question. Having been through this
16:59:49 24 process so far in this case, I don't believe it
16:59:52 25 occurred.

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B437

R. ALAN MILLER

Page 258

16:59:53 1 Q. You don't believe there was a
16:59:54 2 reasonable investigation by the underwriters?

16:59:57 3 A. Right. I don't believe there was
16:59:59 4 one and I don't believe the defendants have
17:00:01 5 established that there was one. Maybe I should do
17:00:05 6 that in reverse order. I don't believe -- perhaps
17:00:08 7 more importantly, I don't believe defendants have
17:00:10 8 established they performed such an investigation.
17:00:14 9 From what I have seen, I also believe they have not
17:00:17 10 performed such investigation.

17:00:18 11 Q. The first point that you just made,
17:00:21 12 which is your point that in your view the underwriters
17:00:26 13 have not established that they conducted a reasonable
17:00:31 14 investigation, as we'll see, that opinion is in your
17:00:34 15 rebuttal report, correct?

17:00:35 16 A. Right.

17:00:36 17 Q. The other opinion that you just
17:00:38 18 articulated, which is that you have an opinion that,
17:00:42 19 in fact, the underwriters did not conduct a reasonable
17:00:47 20 investigation, show me where that is in any of your
17:00:49 21 reports in this case.

17:00:51 22 A. I don't know that I've stated that
17:00:52 23 that way prior to this discussion here.

17:00:56 24 Q. In fact, you haven't, correct?

17:00:58 25 A. I don't recall whether I did or not.

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B438

R. ALAN MILLER

Page 259

17:01:00 1 Q. Take a look at your opening report
17:01:03 2 and your rebuttal report, and if you can find it, show
17:01:06 3 me where it is.
17:01:07 4 MR. LEWIS: Did you have something
17:01:08 5 else to say?
17:01:09 6 THE WITNESS: Yeah. I think in
17:01:09 7 connection with the discussion we've been
17:01:11 8 having is why this arose; that is, you asked
17:01:13 9 these questions and I'm answering them. You
17:01:15 10 asked if I had an opinion about that and I
17:01:17 11 gave it to you.
17:01:18 12 My understanding is the way this
17:01:21 13 works is that the defendants are afforded the
17:01:24 14 opportunity to establish such a defense, and
17:01:27 15 in my view, they have not done so, and that,
17:01:30 16 from a legal perspective, may be where it
17:01:33 17 ends. That's the area in which I was asked
17:01:36 18 to opine and that's the area about which I
17:01:39 19 have opined.
17:01:40 20 In the course of our conversation,
17:01:42 21 then, I believe you asked me if I had an
17:01:43 22 opinion about that and I said I do, but
17:01:47 23 whether or not I offer that is a matter of
17:01:50 24 what counsel decides to pursue.
15:53:01 25 BY MR. GLUCKOW:

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B439

R. ALAN MILLER

Page 260

15:53:01 1 Q. Have you been asked to form an
17:01:56 2 opinion on that question, that question being whether
17:01:58 3 in your opinion the underwriters conducted a
17:02:01 4 reasonable investigation?

17:02:06 5 A. I don't think I've been specifically
17:02:24 6 asked so far to form that opinion. I think I've been
17:02:29 7 asked to address the issue of whether the defendants
17:02:33 8 established that. In the course of reviewing the
17:02:37 9 materials that I've reviewed, based on what I've seen
17:02:45 10 to date and as part of my work in determining whether
17:02:48 11 the defendants have met their burden in that regard, I
17:02:53 12 have formed an opinion about that but, again, I don't
17:02:59 13 know if I will be asked about that and have not
17:03:02 14 discussed that in that sense with counsel.

17:03:04 15 Q. What's your current understanding
17:03:06 16 regarding whether you intend to offer an opinion at
17:03:11 17 trial concerning whether the underwriters conducted a
17:03:14 18 reasonable due diligence investigation?

17:03:18 19 MR. LEWIS: Objection, asked and
17:03:19 20 answered.

17:03:20 21 THE WITNESS: I don't have a current
17:03:21 22 understanding as to whether I would be asked
17:03:23 23 that or not. What I've been asked so far is
17:03:26 24 do I believe the defendants have established
17:03:28 25 that they conducted such an investigation.

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B440

R. ALAN MILLER

Page 261

17:03:34 1 It's -- I don't know whether I would be asked
17:03:43 2 to go to the next step of your question and
17:03:45 3 determine whether I have an opinion on
17:03:48 4 whether the due diligence investigation was
17:03:50 5 adequate or not.

17:03:52 6 BY MR. GLUCKOW:

17:03:52 7 Q. Just to be clear, you agree with me
17:03:54 8 that in your two written opinions to date, you have
17:03:57 9 not offered an opinion on that latter question,
17:04:00 10 namely, whether in your opinion the underwriters
17:04:02 11 conducted a reasonable due diligence investigation,
17:04:05 12 correct?

17:04:05 13 MR. LEWIS: Objection to form; the
17:04:07 14 documents speak for themselves.

17:04:07 15 THE WITNESS: I think that's
17:04:11 16 correct, but I'll be glad to check them and
17:04:13 17 see if I did say that or not.

17:04:14 18 BY MR. GLUCKOW:

17:04:14 19 Q. Only if you feel the need to. I'm
17:04:16 20 quite sure you have not given that opinion, but if you
17:04:20 21 want to be comfortable with that, please take your
17:04:23 22 time to do so.

17:05:38 23 A. No, in the way we've been
17:05:39 24 discussing, I have not offered that so far.

17:05:42 25 Q. Thank you.

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B441

R. ALAN MILLER

Page 262

17:05:43 1 In terms of the materials
17:05:45 2 considered, Mr. Bessette went over this with you a
17:05:49 3 little bit and I won't take much time on it, but if
17:05:49 4 you would turn to Page 6 of your initial report,
17:05:53 5 Paragraph 11, in connection with the underwriters' due
17:06:12 6 diligence, how did you decide what materials you
17:06:16 7 wanted to review?
17:06:34 8 A. I asked counsel what underwriter
17:06:37 9 materials had been produced, if there was a document
17:06:44 10 production, and what testimony there was on that
17:06:46 11 topic, and they identified that for me as the
17:06:51 12 deposition transcripts and the related exhibits.
17:06:58 13 Q. Did counsel explain to you that
17:07:03 14 there was, in fact, a separate underwriter production
17:07:14 15 referred to in Mr. Necarsulmer's report which I know
17:07:23 16 you've seen, UND1 through 11,636?
17:07:23 17 MR. LEWIS: Objection to form.
17:07:25 18 THE WITNESS: Yeah, there was -- we
17:07:28 19 had some discussion about that, yes.
17:07:30 20 BY MR. GLUCKOW:
17:07:30 21 Q. What do you recall about the
17:07:32 22 discussion?
17:07:33 23 A. I asked what there was in the way of
17:07:36 24 underwriter production. It was described to me there
17:07:40 25 was some amount of it; I don't recall how it was

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B442

R. ALAN MILLER

Page 263

17:07:43 1 characterized to me. I asked what it was and if
17:07:58 2 anybody had gone through it, I believe. I don't
17:08:09 3 recall specifically what we discussed about it beyond
17:08:11 4 that. It was not a terribly long discussion about it.
17:08:19 5 I don't recall who suggested it, but I came to the
17:08:23 6 conclusion that I would see what it was that
17:08:25 7 Mr. Necarsulmer produced from that document production
17:08:29 8 to support his opinion, whatever it was going to be.

17:08:33 9 Q. As you sit here today, you have
17:08:36 10 never received or reviewed the underwriters' document
17:08:41 11 production in this case; is that correct?

17:08:42 12 MR. LEWIS: Objection to form.

17:08:44 13 THE WITNESS: It's probably correct
17:08:46 14 with respect to all of it. I know there have
17:08:49 15 been some documents with UND numbers on them
17:08:54 16 and other documents referred to in deposition
17:08:56 17 transcripts and that sort of thing, but I
17:08:59 18 don't believe I have anywhere near the volume
17:09:01 19 that I understand exists.

17:09:03 20 BY MR. GLUCKOW:

17:09:03 21 Q. In fact, at least according to the
17:09:05 22 list on Page 11, the only UND documents you would have
17:09:11 23 received from the underwriters' production would have
17:09:13 24 been those marked as exhibits at depositions, correct?

17:09:19 25 A. From this list, that's correct, and

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B443

R. ALAN MILLER

Page 264

17:09:21 1 I think that might be correct overall. I have seen
17:09:26 2 some underwriter documents or documents that have UND
17:09:31 3 markings on them that I don't recall necessarily being
17:09:36 4 referenced in transcripts, but I haven't tried to
17:09:39 5 match them up that way, so it may be that they are all
17:09:42 6 deposition transcripts, I don't know that.

17:09:44 7 Q. In what connection did you see the
17:09:46 8 documents with the UND on them where you think there's
17:09:50 9 at least a possibility that they may not have been
17:09:53 10 deposition transcripts?

17:09:55 11 A. Just in the normal course of
17:09:57 12 reviewing materials in the litigation.

17:10:01 13 Q. You're not aware of any category of
17:10:09 14 documents or information received from the
17:10:11 15 underwriters' production, as you sit here now, other
17:10:13 16 than those marked as deposition exhibits, correct?

17:10:34 17 THE WITNESS: Can I have that back?
17:10:35 18 (The pending question was read
17:10:36 19 back.)

17:10:36 20 MR. LEWIS: Objection to form.

17:10:38 21 THE WITNESS: I think that's
17:10:38 22 correct. I'm not aware underwriters'
17:10:41 23 documents have been categorized otherwise.

17:10:44 24 BY MR. GLUCKOW:

17:10:44 25 Q. For example, I'm looking at your

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B444

R. ALAN MILLER

Page 265

17:10:46 1 bullet point listed on Page 6 and I'm just trying to
17:10:48 2 think is there any way that the underwriters' document
17:10:51 3 production could be captured in any of those other
17:10:53 4 bullet points, and I'm not able to come up with any
17:10:56 5 way and I'm asking you whether you can. These are the
17:11:03 6 materials that you considered, correct, at least as of
17:11:07 7 the time of your initial report?

17:11:07 8 MR. LEWIS: Objection to form.

17:11:10 9 THE WITNESS: No, I think you're
17:11:12 10 correct, and as we discussed earlier.

17:11:15 11 BY MR. GLUCKOW:

17:11:15 12 Q. What about the underwriters'
17:11:29 13 responses and objections to the plaintiff's sixth set
17:11:35 14 of interrogatories, which were the underwriters'
17:11:38 15 responses to the plaintiff's so-called contention
17:11:42 16 interrogatories? Those are not listed here. Have you
17:11:45 17 ever reviewed those, to your knowledge?

17:11:46 18 MR. LEWIS: Objection to form.

17:11:55 19 THE WITNESS: I don't recall,
17:11:57 20 specifically. There is at least one set of
17:12:02 21 interrogatory answers that I have reviewed.
17:12:04 22 I do not recall off the top of my head if
17:12:06 23 those are underwriters or not.

17:12:08 24 BY MR. GLUCKOW:

17:12:08 25 Q. Are those interrogatory answers that

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B445

R. ALAN MILLER

Page 266

17:12:12 1 you're thinking of listed in the materials that you've
17:12:15 2 considered in any of your reports?
17:12:28 3 A. No.
17:13:03 4 MR. GLUCKOW: Can we mark this,
17:13:05 5 please.
17:13:05 6 (Document Bates Stamped
17:13:05 7 MIL 00090-00115 was marked Exhibit-352 for
17:13:05 8 identification.)
15:53:01 9 BY MR. GLUCKOW:
15:53:01 10 Q. I'm handing you what's been marked
17:13:10 11 as 352; it's from your production in this matter. Is
17:13:13 12 that the set of interrogatory responses you had in
17:13:15 13 mind?
17:13:35 14 A. Yeah, I believe it is.
17:13:41 15 Q. Those are the Adams Golf defendants'
17:13:45 16 responses to the plaintiff's fifth set of
17:13:47 17 interrogatories, correct?
17:13:51 18 A. Correct.
17:13:52 19 Q. Then to the best of your knowledge,
17:14:00 20 you have not reviewed the underwriters' responses and
17:14:03 21 objections to the plaintiff's sixth set of
17:14:05 22 interrogatories, correct?
17:14:12 23 A. Yeah, I think that's correct.
17:14:14 24 Q. Did you review the depositions of
17:14:17 25 the underwriter witnesses?

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B446

R. ALAN MILLER

Page 267

17:14:18 1 A. I did.
17:14:19 2 Q. Did you review specifically the
17:14:22 3 deposition transcript of Olga Pulido-Crowe?
17:14:27 4 A. I did.
17:14:28 5 Q. Did you read the entire transcript
17:14:30 6 or just selected portions?
17:14:32 7 A. No, I read it all.
17:14:32 8 Q. Did you read the exhibits that were
17:14:35 9 referred to during that deposition?
17:14:37 10 A. Yes.
17:14:37 11 Q. In your rebuttal report, 335,
17:15:01 12 Pages 22 to 23 address Mr. Necarsulmer's report?
17:15:07 13 A. Right.
17:15:15 14 Q. I'm going to ask you the same
17:15:17 15 question I asked you about your initial report, which
17:15:20 16 is your best estimate for the amount of time it took
17:15:23 17 you to draft Paragraphs 23, 24, and 25 of the rebuttal
17:15:35 18 report.
17:15:37 19 MR. LEWIS: Objection to the form.
17:16:51 20 THE WITNESS: In this connection, I
17:17:00 21 read Mr. Necarsulmer's report, I reviewed
17:17:04 22 Ms. Pulido-Crowe's transcript, I reviewed
17:17:09 23 Mr. Walravens' transcript or -- I think prior
17:17:17 24 to writing this report, I skimmed
17:17:19 25 Mr. Walravens' transcript and reviewed the

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B447

R. ALAN MILLER

Page 268

17:17:27 1 exhibits from the reports -- the transcripts,
17:17:31 2 I'm sorry. I think I had a conversation with
17:17:59 3 counsel as to whether there was any factual
17:18:04 4 information I was missing in this context
17:18:06 5 from what I had reviewed and then wrote this
17:18:12 6 language, so that process may have taken five
17:18:28 7 to 15 hours -- I'm trying to give you some
17:18:37 8 decent estimate there -- maybe a little
17:18:40 9 longer than that, somewhere in that
17:18:44 10 neighborhood.

17:18:45 11 BY MR. GLUCKOW:

17:18:45 12 Q. I think you anticipated my next
17:18:47 13 question because I believe the answer you just gave,
17:18:49 14 five to 15 hours, somewhere in that neighborhood,
17:18:52 15 maybe a little more than that, wasn't just in terms of
17:18:54 16 drafting these paragraphs but also included the time
17:18:56 17 you spent considering the issues discussed in those
17:19:00 18 paragraphs, correct?

17:19:00 19 MR. LEWIS: Objection to form.

17:19:05 20 THE WITNESS: Right.

17:19:07 21 BY MR. GLUCKOW:

17:19:07 22 Q. In terms of that conversation with
17:19:11 23 counsel you just mentioned, do you recall anything
17:19:14 24 else about that other than what you testified to
17:19:16 25 already?

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B448

R. ALAN MILLER

Page 269

17:19:17 1 MR. LEWIS: Objection to form.

17:19:20 2 THE WITNESS: No, it was a fairly

17:19:22 3 brief conversation of the nature I said. I

17:19:27 4 had summarized what I had observed existed,

17:19:32 5 asked if there was anybody else involved in a

17:19:39 6 significant way in the process, other

17:19:40 7 information that might be missing of that

17:19:42 8 type, and I think that was the nature of the

17:19:44 9 conversation.

17:19:44 10 BY MR. GLUCKOW:

17:19:44 11 Q. What was the answer to that

17:19:47 12 question?

17:19:47 13 A. Basically, no.

17:19:50 14 Q. The information that you had

17:19:51 15 indicated that you had focused on already, if I

17:19:55 16 understood your prior answers correctly, was the Olga

17:19:58 17 Pulido-Crowe deposition transcript and the Walravens'

17:20:02 18 transcript, correct?

17:20:05 19 A. And the exhibits.

17:20:06 20 Q. And the exhibits of those

17:20:08 21 depositions?

17:20:09 22 A. Yeah. I maybe get your question.

17:20:14 23 That is the primary information I looked at related to

17:20:16 24 this topic.

17:20:17 25 Q. Can you think of any other category

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B449

R. ALAN MILLER

Page 270

17:20:21 1 of information, other deposition transcripts, other
17:20:25 2 documents that you looked at in connection with this
17:20:29 3 portion of the assignment prior to submitting your
17:20:32 4 rebuttal report?

17:20:32 5 MR. LEWIS: Objection, compound,
17:20:34 6 vague.

17:20:43 7 THE WITNESS: Other than
17:20:43 8 Mr. Necarsulmer's report, I don't believe so.

17:20:55 9 BY MR. GLUCKOW:

17:20:55 10 Q. Question on the drafting process,
17:20:59 11 I'm going to try it with both the initial report and
17:21:02 12 rebuttal report but I can break it up if we need to.

17:21:06 13 As I'm sure you know, there were a
17:21:08 14 couple of drafts of each of your reports produced, I
17:21:11 15 think two of the initial report and two of the
17:21:13 16 rebuttal report, and there are some what I would
17:21:15 17 characterize as minor language changes reflected when
17:21:20 18 you compare the final version of the reports to the
17:21:22 19 drafts that were produced. To the extent there are
17:21:24 20 differences in the final version of the report versus
17:21:27 21 the drafts, tell me how those changes occurred, and
17:21:31 22 what I'm getting at is whether those changes occurred
17:21:36 23 as a result of discussions with counsel, for example,
17:21:38 24 or whether they occurred with you going back and
17:21:40 25 looking at the document for a second or third or

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B450

R. ALAN MILLER

Page 271

17:21:43 1 fourth time.
17:21:43 2 MR. LEWIS: Objection, compound,
17:21:44 3 vague.
17:21:45 4 THE WITNESS: I don't know if I can
17:21:46 5 do it that way, although I'd like to.
17:21:50 6 First off, I don't know what was
17:21:51 7 produced exactly, I haven't reviewed the
17:21:54 8 production of the drafts, but as I remember
17:21:55 9 the process, I produced a draft and tended to
17:22:05 10 review it myself as well as have
17:22:07 11 conversations with counsel about it.
17:22:09 12 Generally speaking, counsel's
17:22:12 13 contributions are in the area of grammar and
17:22:15 14 the English language, and that usually
17:22:20 15 additions or substantive changes are work
17:22:23 16 that I add. I could go through them and talk
17:22:27 17 about that, but that's generally the way this
17:22:29 18 process has worked and usually the way I
17:22:33 19 work.
17:22:33 20 BY MR. GLUCKOW:
17:22:33 21 Q. In this particular matter, do you
17:22:35 22 recall any substantive changes offered by counsel as
17:22:40 23 opposed to grammar or English language-type changes?
17:22:45 24 A. Let me see if I can tell that.
17:23:19 25 No, not with respect to the rebuttal

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B451

R. ALAN MILLER

Page 272

17:23:27 1 report. It doesn't trigger any memory of substantive
17:23:37 2 input from counsel.

17:23:40 3 Q. Fine; thank you.

17:23:42 4 I noticed in your production I
17:23:43 5 didn't see any notes. Did you keep any notes in
17:23:46 6 connection with your work in this matter?

17:23:48 7 A. No.

17:23:48 8 Q. Any specific reason why?

17:23:51 9 A. No, except in this matter there
17:23:58 10 weren't the source of documents and exhibits and items
17:24:05 11 like that on which I sometimes do take notes as backup
17:24:10 12 or work papers, for example, to a draft and that sort
17:24:13 13 of thing. Here, the drafts basically came out of the
17:24:18 14 review of the materials, and the drafts became the
17:24:20 15 result of what would have been notes otherwise.

17:24:33 16 MR. GLUCKOW: I'm going to mark the
17:24:35 17 AMF rebuttal report.

17:24:39 18 (Mr. Miller's AMF Rebuttal Report
17:24:39 19 was marked Exhibit-353 for identification.)

17:25:07 20 BY MR. GLUCKOW:

17:25:07 21 Q. Mr. Miller, I'm handing you
17:25:23 22 Exhibit-353, which is the rebuttal report that you
17:25:26 23 submitted in AMF. Do you recognize that?

17:25:31 24 A. It's coming back to me.

17:25:49 25 Q. Do you recall whether you used the

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B452

R. ALAN MILLER

Page 273

17:25:51 1 AMF rebuttal report as a model or template for the
17:25:56 2 rebuttal -- for the section of the rebuttal report in
17:26:00 3 Adams Golf that dealt with the underwriters' due
17:26:05 4 diligence question?
17:26:15 5 MR. LEWIS: Objection to form.
17:26:19 6 THE WITNESS: Actually, I don't
17:26:23 7 think so. You asked me if I recall using it
17:26:25 8 as a template; is that what you said?
15:53:01 9 BY MR. GLUCKOW:
15:53:01 10 Q. Did you make reference to the AMF
17:26:30 11 rebuttal report in preparing the section of your
17:26:33 12 rebuttal report in Adams Golf contained in
17:26:37 13 Paragraphs 23, 24, 25?
17:26:45 14 A. The language is very similar. I do
17:27:08 15 recall working from it. It was not -- the reason I'm
17:27:12 16 hesitating on this, it was not a copy that looks like
17:27:15 17 this (indicating). It was a copy of the text but not
17:27:18 18 the heading and the report itself that I was working
17:27:21 19 from, but the language is very similar, sure.
17:27:25 20 Q. In the materials considered portion
17:27:32 21 of your rebuttal, and you have to go all the way back
17:27:35 22 to Page 1 of your rebuttal, you mention in addition to
17:27:41 23 what you reviewed in connection with your initial
17:27:44 24 report, you had also reviewed the expert reports from
17:27:48 25 the defendants, James, Sjoquist, Lynch, then Grace and

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B453

R. ALAN MILLER

Page 274

17:27:57 1 Necarsulmer. I take it you don't recall reviewing any
17:28:03 2 other materials in connection with the preparation of
17:28:06 3 your rebuttal report?
17:28:11 4 MR. LEWIS: Objection to form.
17:28:12 5 THE WITNESS: I think that that's
17:28:21 6 correct. I don't recall any other materials
17:28:31 7 as I sit here.
17:28:35 8 BY MR. GLUCKOW:
17:28:35 9 Q. I'm going to hand you
17:28:43 10 Mr. Necarsulmer's initial report, which has already
17:28:48 11 been marked as 321 (indicating). Keep your rebuttal
17:29:26 12 report open as well.
17:29:29 13 In the first two sentences of your
17:29:32 14 Paragraph 23 in your rebuttal, you address in a
17:29:38 15 general way the outline of responsibilities that
17:29:40 16 Mr. Necarsulmer has provided. I take it you do not
17:29:44 17 disagree with Mr. Necarsulmer's general outline of
17:29:48 18 what underwriters are supposed to do as part of their
17:29:51 19 due diligence; is that correct?
17:29:53 20 MR. LEWIS: Objection to form,
17:29:54 21 foundation.
17:29:56 22 THE WITNESS: No, I don't think I
17:30:54 23 have a problem with his outline. I think
17:30:58 24 enough areas of it are general enough to
17:31:05 25 cover most of the important areas you'd want.

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B454

R. ALAN MILLER

Page 275

17:31:10 1 to get into.
17:31:11 2 BY MR. GLUCKOW:
17:31:11 3 Q. When you were responding to my
17:31:12 4 question, I'm assuming you were looking at 6A and 6B
17:31:15 5 of Mr. Necarsulmer's initial report where he provides
17:31:20 6 those general contours; is that correct?
17:31:22 7 MR. LEWIS: Objection to form.
17:31:23 8 THE WITNESS: Correct.
17:31:28 9 BY MR. GLUCKOW:
17:31:28 10 Q. Then on Pages 3 and 4,
17:31:32 11 Mr. Necarsulmer gives a list of 11 areas of activity
17:31:41 12 that he believes the underwriters undertook as part of
17:31:46 13 their due diligence. I take it you don't dispute that
17:31:52 14 the activities reflected in one through 11 actually
17:31:56 15 took place; is that correct?
17:31:57 16 MR. LEWIS: Objection to form and
17:31:59 17 foundation.
17:32:01 18 THE WITNESS: I'm sorry, could I
17:32:01 19 have the question back?
17:32:01 20 (The pending question was read
17:32:01 21 back.)
17:33:27 22 THE WITNESS: There's some judgment
17:33:29 23 calls in here so I'm not sure I can answer
17:33:35 24 it, the way I understand you're asking, that
17:33:39 25 is.

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B455

R. ALAN MILLER

Page 276

17:33:40 1 BY MR. GLUCKOW:
17:33:40 2 Q. I'm sorry; go ahead.
17:33:42 3 A. Paragraph 1 on Page 3, it appears to
17:33:46 4 be Mr. Necarsulmer's opinion that the offering process
17:33:54 5 was staffed by a team of sufficient size, experience,
17:33:58 6 and seniority to be appropriate for the project; the
17:34:02 7 offering process was staffed by a team. He then makes
17:34:06 8 the judgment as to the rest of the sentence.
17:34:09 9 Q. Let's do it that way, then. Do you
17:34:11 10 disagree that the team was of sufficient size,
17:34:16 11 experience, and seniority to be appropriate to the
17:34:18 12 project or do you just not have an opinion one way or
17:34:25 13 the other on that, or do you agree?
17:34:29 14 A. First off, I think what I've said
17:34:37 15 about this is that his descriptions of these things
17:34:41 16 are extremely general. They don't refer to people,
17:34:46 17 describe their backgrounds, refer to documents
17:34:48 18 reviewed, information discovered, much more
17:34:53 19 importantly independent analysis performed by the
17:34:57 20 underwriters, investigation work, and that sort of
17:35:00 21 thing except in the most general terms, so you can't
17:35:03 22 tell from his presentation what was done to discharge
17:35:07 23 the obligation to conduct a reasonable investigation
17:35:10 24 to come to the conclusions that they came to.
17:35:17 25 That was, at least at the first

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B456

R. ALAN MILLER

Page 277

17:35:20 1 instance, the level of information that I was
17:35:26 2 responding to in my opinions, that is, that
17:35:31 3 specifically with respect to the gray marketing issue,
17:35:33 4 there's no mention of it in here, there's no
17:35:39 5 indication that the issue was uncovered, discussed,
17:35:45 6 analyzed, that independent information was obtained to
17:35:50 7 evaluate it, that the impact of it was considered in
17:35:54 8 any fashion, so I don't see where the generalities
17:36:00 9 that Mr. Necarsulmer describes in these various
17:36:03 10 categories established the adequacy of the
17:36:09 11 investigation conducted by the underwriters in this
17:36:13 12 matter.
17:36:13 13 Q. Are you finished?
17:36:16 14 A. Yeah, I think that responds to your
17:36:19 15 question.
17:36:20 16 Q. Not at all. Move to strike.
17:36:22 17 MR. GLUCKOW: Read back my question.
17:36:22 18 (The preceding question was read
17:36:22 19 back as follows:
17:34:09 20 Question: Let's do it that, way
17:34:10 21 then. Do you disagree that the team was of
17:34:15 22 sufficient size, experience, and seniority to
17:34:17 23 be appropriate to the project or do you just
17:34:23 24 not have an opinion one way or the other on
17:34:25 25 that, or do you agree?)

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B457

R. ALAN MILLER

Page 278

17:36:22 1 THE WITNESS: In terms of presenting
17:36:54 2 a defense theory, it does not discuss the
17:36:59 3 people, their backgrounds, their experience,
17:37:02 4 why he thinks they were qualified, what work
17:37:05 5 they did, how they were supervised, and that
17:37:12 6 sort of thing. There's no information
17:37:15 7 presented except the conclusion that he comes
17:37:17 8 to.

17:37:17 9 BY MR. GLUCKOW:

17:37:17 10 Q. I'm asking you whether you agree
17:37:19 11 with that conclusion or whether you haven't formed any
17:37:23 12 opinion on it at all.

17:37:24 13 MR. LEWIS: Objection to form,
17:37:25 14 foundation, and scope of opinion.

17:37:27 15 Go ahead.

17:37:27 16 THE WITNESS: Regarding
17:37:28 17 Mr. Necarsulmer's work, I was asked to
17:37:32 18 determine if he established that the
17:37:35 19 underwriters had conducted an adequate
17:37:39 20 investigation as we've been discussing, and
17:37:42 21 what I'm saying is with respect to
17:37:45 22 Paragraph 1 specifically and then more
17:37:46 23 generally the rest of this work, that he has
17:37:50 24 not presented any information on which
17:37:52 25 someone could make that determination. What

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B458

R. ALAN MILLER

Page 279

17:37:54 1 he's presented is his conclusions as to those
17:37:58 2 things.

17:37:59 3 BY MR. GLUCKOW:

17:37:59 4 Q. I understand that you're not happy
17:38:01 5 with Mr. Necarsulmer's report, and that's fine, we'll
17:38:04 6 deal with that. What I'm asking you is whether you
17:38:07 7 have any opinion of your own regarding whether the
17:38:11 8 offering process was staffed by a team of sufficient
17:38:14 9 size, experience, and seniority to be appropriate for
17:38:16 10 the project, and if you haven't formed an opinion on
17:38:18 11 that, that's fine, just tell me that.

17:38:21 12 MR. LEWIS: Objection to form and
17:38:22 13 foundation.

17:38:23 14 Go ahead.

17:38:24 15 THE WITNESS: I've had thoughts
17:38:26 16 about that. I don't know that I've actually
17:38:28 17 formed a formal opinion on that as you're
17:38:32 18 asking me, as I think you may be asking me
17:38:35 19 here.

17:38:37 20 My thoughts in that area have been
17:38:43 21 that there was no managing director actually
17:38:49 22 involved in the process, as far as I could
17:38:51 23 tell. From the information I've reviewed so
17:38:53 24 far, Mr. Francis was a figurehead whose
17:38:56 25 fingerprints are not on the project, that

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B459

R. ALAN MILLER

Page 280

17:39:01 1 Ms. Pulido-Crowe was hoping to become a
17:39:05 2 managing director and was at the time -- I
17:39:12 3 forget the next title, I think it was vice
17:39:18 4 president -- conducting oversight on the
17:39:19 5 work, much of which was delegated to
17:39:22 6 Mr. Walravens and a financial analyst whose
17:39:29 7 name, unfortunately, I can't recall, and that
17:39:33 8 I'm not sure I saw any evidence of
17:39:37 9 involvement by more senior personnel with
17:39:40 10 perhaps more business experience and
17:39:44 11 background with regard to critical issues
17:39:48 12 such as gray marketing, and if the team had
17:39:56 13 the experience to be appropriate for the
17:40:01 14 project, I saw no evidence of inclination to
17:40:09 15 perform independent analysis with respect to
17:40:11 16 the gray market issue specifically from that
17:40:15 17 team, which suggested either a lack of
17:40:18 18 experience in the area or a simple failure to
17:40:23 19 follow up on information that was obviously
17:40:27 20 deserving of follow-up.

17:40:28 21 BY MR. GLUCKOW:

17:40:28 22 Q. You don't dispute that the
17:40:31 23 underwriters had discussions with senior management at
17:40:35 24 the company concerning the gray market issue, correct?

17:40:38 25 MR. LEWIS: Objection to form.

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B460

R. ALAN MILLER

Page 281

17:40:39 1 THE WITNESS: No, I don't dispute,
17:40:41 2 from what I've seen, that they had
17:40:43 3 discussions with a couple of management
17:40:44 4 people about the topic.
17:40:45 5 BY MR. GLUCKOW:
17:40:45 6 Q. You don't dispute that the
17:40:47 7 underwriters conducted telephone interviews with at
17:40:56 8 least seven of Adams' top customers concerning a
17:41:00 9 variety of topics, correct?
17:41:01 10 MR. LEWIS: Objection to form and
17:41:02 11 foundation.
17:41:03 12 THE WITNESS: No, I don't dispute
17:41:06 13 that from what I can see those interviews
17:41:09 14 took place; no.
17:41:09 15 BY MR. GLUCKOW:
17:41:09 16 Q. Don't you consider those interviews
17:41:11 17 an example of the kind of independent verification
17:41:14 18 that you're referring to?
17:41:18 19 A. No. That is that the conduct of
17:41:22 20 outside interviews absent management participation is
17:41:25 21 important, but when no specific questioning is made
17:41:31 22 about the gray marketing or the effect of gray
17:41:33 23 marketing, more importantly, no contact was made with
17:41:37 24 any of the people who had complained about gray
17:41:40 25 marketing, no documentation or correspondence was

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B461

R. ALAN MILLER

Page 282

17:41:42 1 reviewed with respect to the complaints about gray
17:41:48 2 marketing, no independent follow-up was made to
17:41:52 3 determine if it was a problem or what the impact of it
17:41:55 4 was other than the assurance that I believe it was
17:42:01 5 Mr. Adams gave to Ms. Pulido-Crowe with respect to
17:42:06 6 Costco by saying don't pursue your own independent
17:42:09 7 inquiry of Costco, I'll take care of them, or
17:42:12 8 something to that effect, and/or Ms. Pulido-Crowe's
17:42:18 9 assessment that since her husband wouldn't purchase
17:42:22 10 sporting goods items at Costco, that it was not likely
17:42:26 11 to be a threat to Adams Golf.

17:42:28 12 Those are what I remember about the
17:42:29 13 disposition of the issue with management, but that
17:42:32 14 seemed to end the inquiry, from what I can tell.

17:42:37 15 Q. One of the things you said in that
17:42:40 16 answer was that there was no mention of the gray
17:42:43 17 marketing issue in the customer surveys; is that
17:42:43 18 correct?

17:42:48 19 A. Right.

17:42:48 20 Q. There was a specific question that
17:42:49 21 said are there any other issues, legal, contractual,
17:42:52 22 or otherwise, which you feel are important; isn't that
17:42:58 23 correct?

17:42:58 24 MR. LEWIS: Objection to form.

17:42:59 25 THE WITNESS: I understand that was

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B462

R. ALAN MILLER

Page 283

17:43:00 1 a question on the outline.
17:43:01 2 BY MR. GLUCKOW:
17:43:01 3 Q. You understand that was a question
17:43:03 4 that was asked of the customers who were interviewed
17:43:06 5 by the underwriters, correct?
17:43:10 6 A. I understood it was a question on
17:43:11 7 the outline to be asked. I don't recall reading
17:43:15 8 enough detail about the actual conversations to know
17:43:18 9 if it was asked or how it was asked or what the
17:43:22 10 inclination of the customer would have been to provide
17:43:25 11 the information over the telephone, what their
17:43:30 12 attitude toward Adams was at that point as a customer
17:43:35 13 trying to acquire a hot club in that market. I don't
17:43:41 14 know a lot of those things about the customer
17:43:44 15 interviews over the telephone.
17:43:45 16 Q. Did you review the actual record
17:43:49 17 reflecting the 11 interviews that the underwriters
17:43:53 18 conducted which show the responses received?
17:43:59 19 A. I saw at least some of that
17:44:01 20 information in some exhibits, yes.
17:44:03 21 Q. Isn't it true that in going through
17:44:06 22 each and every one of those 11 telephone interviews,
17:44:11 23 not a single one of the responses indicated any
17:44:14 24 concern about gray market or Costco?
17:44:17 25 MR. LEWIS: Objection to foundation

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B463

R. ALAN MILLER

Page 284

17:44:20 1 and form; misstates the evidence.
17:44:23 2 THE WITNESS: I don't recall seeing
17:44:24 3 any mention in the responses of Costco or
17:44:35 4 gray marketing.
17:44:36 5 BY MR. GLUCKOW:
17:44:36 6 Q. Mr. Necarsulmer says, in his
17:44:40 7 rebuttal report which I know you've seen, these kinds
17:44:40 8 of interviews with independent parties are the type of
17:44:43 9 work underwriters should engage in to confirm
17:44:47 10 discussions with company management. Don't you agree
17:44:49 11 with that?
17:44:49 12 MR. LEWIS: Objection to form.
17:44:51 13 THE WITNESS: Again, as a general
17:44:53 14 category, I certainly agree that underwriters
17:44:56 15 should conduct independent interviews with
17:44:58 16 outside parties to confirm information they
17:45:02 17 have received from management. Whether or
17:45:05 18 not the way these were done, the basis of the
17:45:10 19 selection of the parties to interview, and
17:45:12 20 all those sorts of things were adequate are,
17:45:15 21 I think, question marks at this point in that
17:45:18 22 area.
17:45:19 23 BY MR. GLUCKOW:
17:45:19 24 Q. Again, the only deposition
17:45:26 25 transcripts of underwriters you can recall reading are

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B464

R. ALAN MILLER

Page 285

17:45:30 1 Pulido-Crowe and Walravens', correct?
17:45:32 2 MR. LEWIS: Objection to form.
17:45:37 3 THE WITNESS: I believe that's
17:45:37 4 correct.
17:45:38 5 BY MR. GLUCKOW:
17:45:38 6 Q. You've never reviewed the
17:45:40 7 underwriters' document production in this case,
17:45:42 8 correct?
17:45:42 9 A. Other than those we've discussed.
17:45:43 10 Q. Other than as marked as exhibits at
17:45:45 11 depositions, correct?
17:45:46 12 A. I think that's correct.
17:45:48 13 Q. You referred to a conversation
17:45:51 14 between Pulido-Crowe and Mr. Adams regarding gray
17:45:56 15 marketing and Costco. Is it your understanding that
17:45:59 16 the only discussions that the underwriters had
17:46:02 17 concerning the gray market issue took place between
17:46:06 18 Ms. Pulido-Crowe and Mr. Adams?
17:46:10 19 MR. LEWIS: Objection to form.
17:46:11 20 THE WITNESS: No, I don't think
17:46:13 21 that's necessarily right. I think there were
17:46:15 22 conversations with one of the other
17:46:16 23 management people at least, maybe two others,
17:46:20 24 of the salespeople --
17:46:21 25 BY MR. GLUCKOW:

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B465

R. ALAN MILLER

Page 286

17:46:21 1 Q. Gonsalves?
17:46:26 2 A. -- the sales executives, Gonsalves
17:46:26 3 and --
17:46:31 4 Q. Beebe?
17:46:31 5 A. -- possibly Beebe, about that topic.
17:46:37 6 Q. How many conversations are you aware
17:46:39 7 of between the underwriters and Adams' management
17:46:42 8 concerning the gray marketing or Costco issue?
17:46:49 9 A. As far as I can recall, I don't
17:46:57 10 recall reference to more than a few outside of the
17:47:03 11 Hoffman letter issue, if we can call it that, but with
17:47:08 12 respect to pursuing independent investigation and that
17:47:13 13 sort of thing, essentially none.
17:47:16 14 MR. LEWIS: I want to back up and
17:47:17 15 retroactively object to the question
17:47:18 16 suggesting that there was a conversation with
17:47:21 17 Beebe since the record does not reflect any
17:47:24 18 such conversation. It misstates --
17:47:32 19 MR. GLUCKOW: I disagree with your
17:47:35 20 characterization, but the record will speak
17:47:38 21 for itself.
17:47:39 22 BY MR. GLUCKOW:
17:47:39 23 Q. What's your basis for saying that
17:47:48 24 Mr. Francis's role was purely as a figurehead?
17:47:52 25 A. Ms. Pulido-Crowe's testimony to that

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B466

R. ALAN MILLER

Page 287

17:47:59 1 effect.
17:47:59 2 Q. You take from Ms. Pulido-Crowe's
17:48:02 3 testimony that Francis was nothing more than a
17:48:05 4 figurehead?
17:48:06 5 A. In very shorthand form, yes --
17:48:08 6 Q. Do you have any other basis for
17:48:10 7 that?
17:48:10 8 MR. LEWIS: Please don't cut him
17:48:12 9 off.
17:48:12 10 BY MR. GLUCKOW:
17:48:12 11 Q. I'm sorry.
17:48:13 12 A. She described, as I recall, his
17:48:16 13 attendance at certain meetings, his fronting the
17:48:19 14 presentations to the commitment committee, and what I
17:48:19 15 would describe as more of a political role in the
17:48:23 16 process than a substantive role in an investigatory
17:48:31 17 way or anything of that nature.
17:48:32 18 Q. Any other basis for that statement?
17:48:35 19 MR. LEWIS: Objection to form and
17:48:42 20 foundation.
17:48:43 21 THE WITNESS: Only that in
17:48:45 22 discussing the functions that they were
17:48:48 23 performing, in the deposition I don't recall
17:48:52 24 either Pulido-Crowe or Walravens referring to
17:48:55 25 Francis having done anything in the process

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B467

R. ALAN MILLER

Page 288

17:49:00 1 of conducting investigation or interviews or
17:49:05 2 any of those sorts of functions other than,
17:49:07 3 as Pulido-Crowe describes, in what I'll call
17:49:11 4 a more political role.

17:49:13 5 BY MR. GLUCKOW:

17:49:13 6 Q. Is it your opinion the underwriters
17:49:20 7 should have contacted Costco?

17:49:24 8 MR. LEWIS: Objection to form and
17:49:25 9 foundation.

17:49:34 10 THE WITNESS: I don't know, I hadn't
17:49:44 11 thought about that specifically, but I
17:49:46 12 certainly think, backing up a step, in terms
17:49:49 13 of generality they certainly should have
17:49:51 14 investigated the Costco matter independently,
17:49:54 15 whether that involved contacting Costco,
17:49:57 16 which was certainly one possibility since
17:50:01 17 Lehman Brothers appeared to have some entree
17:50:05 18 to Costco, I don't recall specifically what
17:50:08 19 that was, but contacting Costco directly
17:50:10 20 seemed to be one choice, contacting an
17:50:13 21 industry expert with knowledge of those types
17:50:15 22 of things to conduct an independent analysis
17:50:17 23 is another choice; there may have been
17:50:20 24 different ways to accomplish that. I haven't
17:50:24 25 thought further about how that should have

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B468

R. ALAN MILLER

Page 289

17:50:26 1 been done, but something should have been
17:50:28 2 done along those lines to pursue that issue.

17:50:30 3 BY MR. GLUCKOW:

17:50:30 4 Q. As you sit here today, what is it
17:50:34 5 that you think needed to be done to have what, in your
17:50:39 6 view, would have been a reasonable investigation?

17:50:41 7 MR. LEWIS: Objection to form and
17:50:44 8 foundation, compound, and we've been over a
17:50:46 9 lot of this already.

17:50:49 10 Go ahead.

17:50:50 11 THE WITNESS: Again, that's an area
17:51:04 12 I have not been asked for specific opinions
17:51:06 13 on to this time. I have produced the opinion
17:51:11 14 so far that Mr. Necarsulmer has not
17:51:14 15 demonstrated that a reasonable and adequate
17:51:18 16 investigation was performed, which is what I
17:51:20 17 was asked to opine to in this area.

17:51:23 18 Having conducted some analysis of
17:51:26 19 this and reviewed the information we
17:51:28 20 discussed so far today, I have reached some
17:51:31 21 opinions about what I know so far appeared to
17:51:40 22 have been done or not done, and that's the
17:51:42 23 basis on which I am answering your questions
17:51:45 24 now.

17:51:45 25 In terms of what should have been

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B469

R. ALAN MILLER

Page 290

17:51:47 1 done to conduct a reasonable investigation,
17:51:50 2 at a minimum, the project should have been
17:51:53 3 staffed sufficiently to ensure that somebody
17:51:59 4 would take the responsibility to conduct an
17:52:02 5 independent investigation of potential
17:52:05 6 problem areas as they arose. The one I'm
17:52:10 7 concerned about, obviously, is gray
17:52:13 8 marketing.

17:52:13 9 When that appeared to be an issue,
17:52:19 10 based on the information that clubs were
17:52:20 11 appearing in Costco, the underwriters should
17:52:25 12 have conducted an independent investigation
17:52:26 13 as to what that meant, what effect it was
17:52:30 14 having on the retailers and distributors,
17:52:32 15 what effect it was having on customers, how
17:52:36 16 Costco was obtaining the clubs, whether it
17:52:40 17 was likely to continue, what effect gray
17:52:45 18 marketing had on companies that suffered from
17:52:47 19 it.

17:52:48 20 The red flag, I believe, had been
17:52:53 21 raised once the underwriters obtained
17:52:57 22 knowledge of the clubs' appearance in Costco.
17:53:00 23 The issue had been raised by appearance in
17:53:03 24 Callaway's 10-K and industry knowledge was
17:53:11 25 available, according to Mr. Magnussen, about

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B470

R. ALAN MILLER

Page 291

17:53:15 1 gray marketing, so it doesn't seem as though
17:53:18 2 it should have been all that difficult to get
17:53:20 3 into the industry and get information about
17:53:24 4 that and, thereafter, determine what to do
17:53:28 5 about it.
17:53:29 6 BY MR. GLUCKOW:
17:53:29 7 Q. Anything else, because we're going
17:53:32 8 to go through each of these, but I want to know if
17:53:37 9 there's anything else before we do?
17:53:39 10 MR. LEWIS: We're at five of six.
17:53:41 11 We started nine hours ago, which is okay.
17:53:45 12 We're all tired. The witness, I'm sure --
17:53:48 13 I'm tired, at least. Maybe everybody else
17:53:51 14 isn't, but I'm very tired. The witness is
17:53:53 15 tired. We're very close, if not past, the
17:53:56 16 seven-hour limit. I want to give you some
17:53:59 17 leeway, but we're going to have to cut off at
17:54:02 18 some point.
17:54:03 19 MR. GLUCKOW: If you're tired, the
17:54:04 20 witness is tired, I'm happy to pick this up
17:54:06 21 on Monday, but here's my point --
17:54:09 22 MR. LEWIS: We're not picking up
17:54:11 23 Monday.
17:54:12 24 MR. GLUCKOW: That's fine, we'll
17:54:12 25 just keep going; I'm not suggesting that we

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B471

R. ALAN MILLER

Page 292

17:54:12 1 need to.

17:54:14 2 All I'm saying is you had as much

17:54:14 3 time as you needed with Mr. Necarsulmer,

17:54:18 4 right, and they had as much time as they

17:54:20 5 needed upstairs today with Mr. James.

17:54:21 6 MR. LEWIS: Right, but nobody has

17:54:23 7 gone past the seven-hour limit, as far as I'm

17:54:26 8 aware of, and that's established by the

17:54:27 9 rules. I'm not trying to be difficult about

17:54:29 10 it, but you don't get to go on until ten

17:54:32 11 o'clock because you have questions until ten

17:54:34 12 o'clock; you have your limit. I'm trying to

17:54:38 13 be flexible on it, but if you're not going to

17:54:40 14 be flexible with me and find a way to meet

17:54:41 15 some reasonable limit at this time of day,

17:54:43 16 then we're going to have to cut it off.

17:54:46 17 MR. GLUCKOW: I certainly intend to

17:54:47 18 be reasonable but I certainly also intend to

17:54:50 19 complete the examination, so hopefully that

17:54:53 20 will be something we can both live with.

17:54:55 21 MR. LEWIS: It's got to be pretty

17:54:58 22 soon.

17:55:08 23 BY MR. GLUCKOW:

17:55:08 24 Q. I think I was asking you was there

17:55:10 25 anything else before we go back through these items.

R. ALAN MILLER

Page 293

17:55:44 1 A. I have not compared the outline of
17:55:46 2 Mr. Necarsulmer in here with the paragraphs that I had
17:55:50 3 submitted outlining an underwriter's responsibilities
17:55:55 4 in the context of due diligence to see how his
17:55:59 5 opinions stack up against those.
17:56:00 6 (Mr. Bessette leaves the
17:56:00 7 deposition.)
17:56:00 8 (Mr. Collins enters the deposition.)
17:56:05 9 THE WITNESS: Without having done
17:56:05 10 that, I think the additional red flag that
17:56:08 11 exists in these materials, to those I've
17:56:11 12 already discussed, would be in Paragraph 6,
17:56:15 13 which --
17:56:16 14 BY MR. GLUCKOW:
17:56:16 15 Q. I'm sorry, Paragraph 6 of?
17:56:18 16 A. I'm sorry, Page 3 of
17:56:21 17 Mr. Necarsulmer, which refers to the commitment
17:56:24 18 committee memo, I believe, which did have a line in it
17:56:28 19 referring to the importance of maintaining margins, I
17:56:31 20 believe it was, at Adams and how those could not be
17:56:34 21 allowed to deteriorate or something to that effect,
17:56:38 22 so, again, that identifies someone was aware of the
17:56:41 23 general issue of margin maintenance but not in the
17:56:44 24 specific wording of gray marketing.
17:56:46 25 Having said that, I think the answer

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B473

R. ALAN MILLER

Page 294

17:56:49 1 I gave you previously probably covers at least the
17:56:52 2 major areas of where I would be today on this issue
17:56:55 3 since you raised it and asked me.
17:56:58 4 Q. Can you think of any other areas? I
17:57:00 5 don't want you to say that they're just the major
17:57:01 6 ones. Can you think of any other areas as of today
17:57:04 7 that you think would have required follow-through --
17:57:06 8 MR. LEWIS: Objection.
17:57:07 9 BY MR. GLUCKOW:
17:57:07 10 Q. -- in your opinion?
17:57:08 11 MR. LEWIS: Form, foundation, scope
17:57:12 12 of the opinion.
17:57:13 13 THE WITNESS: Again, I haven't been
17:57:14 14 asked to form an opinion on that prior to
17:57:17 15 this time and I've been giving you the
17:57:20 16 thoughts I have in this area in response to
17:57:23 17 your questions, and I think I hit on the
17:57:25 18 major area, particularly with respect to gray
17:57:28 19 marketing, and that being the lack of
17:57:31 20 independent investigation by the underwriters
17:57:33 21 of the issue and the willingness to accept
17:57:36 22 Mr. Adams' assertion he would take care of
17:57:39 23 the Costco problem and essentially leaving it
17:57:44 24 at that, so I think that probably covers it
17:57:46 25 with respect to that issue.

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B474

R. ALAN MILLER

Page 295

17:57:48 1 I have not sat here and attempted to
17:57:50 2 go beyond that and think about every other
17:57:54 3 area they may have been deficient in their
17:57:58 4 work, and have not been asked to do that to
17:57:58 5 this point, but I think the major issue with
17:58:01 6 respect to gray marketing would be covered by
17:58:02 7 that topic.

17:58:04 8 BY MR. GLUCKOW:

17:58:04 9 Q. Putting aside the gray market issue
17:58:10 10 or the Costco issue, however you want to phrase it,
17:58:13 11 you're not offering any opinion that the underwriters'
17:58:17 12 investigation was less than reasonable in any other
17:58:22 13 way, are you? I've never heard you suggest otherwise.

17:58:24 14 MR. LEWIS: Objection to form,
17:58:25 15 foundation, scope.

17:58:27 16 BY MR. GLUCKOW:

17:58:27 17 Q. Am I correct?

17:58:27 18 A. I haven't been asked that question.
17:58:30 19 I haven't been asked to focus on areas other than gray
17:58:36 20 marketing, so I couldn't answer that in that sense.

17:58:37 21 Q. The margins issue you mentioned
17:58:39 22 before with respect to Paragraph 6 is reflected in the
17:58:42 23 prospectus, correct?

17:58:45 24 A. Again, in a very general way, the
17:58:49 25 issue of maintenance of sales price margin is

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B475

R. ALAN MILLER

Page 296

17:58:51 1 mentioned in the prospectus, but that's all it says in
17:58:55 2 the prospectus, is basically that one line.
17:59:05 3 Q. Are you aware of Mr. Frazier's
17:59:09 4 opinion, Professor Frazier's opinion, in this case?
17:59:19 5 A. I don't believe so.
17:59:19 6 Q. You haven't seen the transcript of
17:59:22 7 his deposition from earlier this week?
17:59:24 8 A. I have not.
17:59:26 9 MR. LEWIS: In five minutes, I'm
17:59:28 10 going to ask the court reporter to do a
17:59:31 11 calculation of time for us so we can reach
17:59:33 12 some conclusion here.
17:59:33 13 BY MR. GLUCKOW:
18:00:15 14 Q. I think we've confirmed this, but if
18:00:18 15 you turn to Paragraph 25 on Page 23 of your rebuttal
18:00:22 16 report, in the last sentence you state in your opinion
18:00:36 17 the expert report of Mr. Necarsulmer does not meet the
18:00:38 18 underwriters' burden to demonstrate that the
18:00:43 19 investigation and/or resulting disclosures were
18:00:45 20 reasonable and adequate, correct?
18:00:47 21 A. Right.
18:00:48 22 Q. You're not offering an opinion in
18:00:52 23 this report, I think we've established, dealing with
18:00:55 24 whether in your opinion the underwriters'
18:00:58 25 investigation was reasonable, correct; you have not

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B476

R. ALAN MILLER

Page 297

18:01:00 1 offered a written opinion on that question?
18:01:02 2 MR. LEWIS: Objection to form.
18:01:04 3 THE WITNESS: That's correct.
18:01:04 4 BY MR. GLUCKOW:
18:01:04 5 Q. What are your qualifications to
18:01:07 6 opine on whether Mr. Necarsulmer has met the
18:01:10 7 underwriters' burden?
18:01:12 8 MR. LEWIS: Objection to form,
18:01:13 9 foundation; calls for legal conclusion.
18:01:17 10 THE WITNESS: I think we've
18:01:20 11 discussed those earlier today at some length.
18:01:23 12 BY MR. GLUCKOW:
18:01:23 13 Q. You have nothing to add to the
18:01:26 14 qualifications that enable you to offer that opinion
18:01:28 15 other than what we talked about earlier?
18:01:30 16 MR. LEWIS: Objection to form,
18:01:31 17 foundation, legal conclusion.
18:01:34 18 THE WITNESS: Yeah, I think that's
18:01:39 19 probably correct in terms of background,
18:01:42 20 education, work experience, and that sort of
18:01:45 21 thing.
18:01:47 22 Having said that and having reviewed
18:01:49 23 the information that I've reviewed that we've
18:01:53 24 discussed, having reviewed Mr. Necarsulmer's
18:01:56 25 report, it's a fairly easy matter in the

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B477

R. ALAN MILLER

Page 298

18:02:03 1 sense of reading the English language to
18:02:09 2 determine that he has not presented the sort
18:02:12 3 of information that one would need to present
18:02:15 4 to meet the burden as outlined in my report
18:02:19 5 and rebuttal report and as outlined in
18:02:22 6 Mr. Necarsulmer's report as well.
18:02:26 7 BY MR. GLUCKOW:
18:02:26 8 Q. I take it you've never been a judge,
18:02:30 9 correct?
18:02:30 10 MR. LEWIS: Objection to form.
18:02:31 11 THE WITNESS: Correct.
18:02:32 12 BY MR. GLUCKOW:
18:02:32 13 Q. Have you reviewed Mr. Necarsulmer's
18:02:37 14 rebuttal report?
18:02:38 15 A. Yes.
18:02:39 16 Q. Have you considered the extent to
18:02:51 17 which, if at all, Mr. Necarsulmer's rebuttal report
18:02:53 18 alters the opinion that you've offered in your
18:02:55 19 rebuttal report and your initial report?
18:02:57 20 MR. LEWIS: Objection to form,
18:02:59 21 foundation.
18:03:01 22 THE WITNESS: I did, when I reviewed
18:03:04 23 Mr. Necarsulmer's rebuttal report.
18:03:06 24 BY MR. GLUCKOW:
18:03:06 25 Q. And the results of that

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B478

R. ALAN MILLER

Page 299

18:03:08 1 consideration?

18:03:09 2 A. I'd have to review that again

18:03:11 3 quickly to tell you.

18:03:13 4 Q. Sure. It's already been marked.

18:03:17 5 I'll hand you a copy. It's Exhibit-322 (indicating).

18:03:21 6 MR. LEWIS: While you're reviewing

18:03:23 7 that, Mr. Miller, let's have the court

18:03:24 8 reporter do the Herculean task of figuring

18:03:28 9 out how much time we have used.

18:05:07 10 THE COURT REPORTER: Seven and a

18:05:09 11 half hours of testimony.

18:05:15 12 MR. LEWIS: I'll let him answer your

18:05:17 13 last question.

18:05:17 14 MR. GLUCKOW: No, no, no.

18:05:17 15 MR. COLLINS: Let's go off the

18:05:17 16 record.

18:05:17 17 (Discussion held off the record.)

18:13:43 18 MR. GLUCKOW: Plaintiffs have

18:13:43 19 announced that in ten minutes this dep is

18:13:46 20 over in terms of defendant's questioning.

18:13:49 21 Defendants are reserving all their

18:13:51 22 rights but are happy to ask ten more minutes'

18:13:53 23 worth of questions.

18:13:58 24 MR. LEWIS: Let's also state on the

18:13:59 25 record that we have already been advised by

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B479

R. ALAN MILLER

Page 300

18:14:02 1 the court reporter's calculations that we are
18:14:05 2 at the seven-and-a-half-hour mark in terms of
18:14:08 3 deposition time and it is late in the day and
18:14:10 4 we did start somewhat earlier.
18:14:13 5 MR. GLUCKOW: I have said that I'm
18:14:16 6 happy to come back if we need to and you had
18:14:19 7 four hours with Mr. Necarsulmer and whatever
18:14:22 8 with Mr. James.
18:14:23 9 Let's move on.
18:14:24 10 (The preceding question was read
18:14:46 11 back.)
18:14:46 12 BY MR. GLUCKOW:
18:14:46 13 Q. Now that you have Mr. Necarsulmer's
18:14:49 14 rebuttal report in front of you, Exhibit-322, we were
18:14:52 15 discussing whether your review of the rebuttal report
18:14:59 16 caused you to reconsider the opinions set forth in
18:15:04 17 your own rebuttal report, that is, that
18:15:06 18 Mr. Necarsulmer had not met the underwriters' burden
18:15:11 19 to demonstrate that the investigation and/or resulting
18:15:20 20 disclosures were reasonable and adequate.
18:15:22 21 MR. LEWIS: Objection to form.
18:15:25 22 THE WITNESS: It does not cause me
18:15:27 23 to change my opinion.
18:15:29 24 BY MR. GLUCKOW:
18:15:29 25 Q. Why?

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B480

R. ALAN MILLER

Page 301

18:15:30 1 MR. LEWIS: Objection to form,
18:15:31 2 compound.
18:15:32 3 THE WITNESS: Essentially, because
18:15:33 4 there's nothing substantive added in
18:15:35 5 Mr. Necarsulmer's rebuttal report.
18:15:37 6 BY MR. GLUCKOW:
18:15:37 7 Q. Did you review the various
18:15:42 8 deposition testimony cited in Mr. Necarsulmer's
18:15:44 9 rebuttal report?
18:15:47 10 A. I reviewed some of that testimony.
18:15:54 11 I reviewed Ms. Pulido-Crowe and Mr. Adams' deposition
18:16:01 12 transcripts on those areas. I reviewed -- among this
18:16:09 13 list, that was it.
18:16:10 14 Q. Did you review the various documents
18:16:13 15 with the UND prefix cited in Mr. Necarsulmer's
18:16:17 16 rebuttal report?
18:16:20 17 A. I did not, nor did I believe that
18:16:39 18 would likely change my opinion.
18:16:41 19 Q. Why is that?
18:16:43 20 -- A. Because all this has to do with
18:16:45 21 acceptance of management's assertions with respect to
18:16:49 22 gray marketing and indicates no independent
18:16:51 23 investigation by the underwriters and no contribution
18:16:56 24 to that area beyond what existed in Mr. Necarsulmer's
18:17:01 25 original report.

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B481

R. ALAN MILLER

Page 302

18:17:02 1 Q. Notwithstanding 3C, which obviously
18:17:05 2 refers to independent phone calls with third parties,
18:17:09 3 correct?
18:17:10 4 MR. LEWIS: Object to the form.
18:17:11 5 THE WITNESS: Right, which we've
18:17:13 6 already discussed today.
18:17:16 7 BY MR. GLUCKOW:
18:17:16 8 Q. Do you agree with Mr. Necarsulmer's
18:17:20 9 statement in D on Page 2 that the reasonableness of
18:17:25 10 underwriters' due diligence must be assessed based on
18:17:29 11 the information that is reasonably available at the
18:17:31 12 time of the offering?
18:17:31 13 MR. LEWIS: Objection to form,
18:17:34 14 foundation, legal conclusion.
18:17:36 15 THE WITNESS: Sure.
18:17:41 16 BY MR. GLUCKOW:
18:17:41 17 Q. I assume you agree with
18:17:44 18 Mr. Necarsulmer's statement in F that the mention of a
18:17:48 19 risk in one issuer's filings is not necessarily
18:17:55 20 determinative of whether the risk needs to be included
18:17:58 21 in another issuing company's registration statement,
18:18:02 22 correct?
18:18:05 23 MR. LEWIS: Objection to form,
18:18:05 24 foundation.
18:18:07 25 THE WITNESS: I agree with it in

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B482

R. ALAN MILLER

Page 303

18:18:08 1 exactly the limited way it is stated; that
18:18:10 2 is, I agree that such an identification is
18:18:11 3 not determinative of inclusion but certainly
18:18:15 4 constitutes a red flag warranting
18:18:18 5 investigation by the underwriter.
18:18:20 6 BY MR. GLUCKOW:
18:18:20 7 Q. Sitting here today, do you know
18:18:22 8 whether the underwriters considered Callaway's 10-K
18:18:28 9 disclosure that you mentioned earlier as part of their
18:18:31 10 analysis?
18:18:32 11 MR. LEWIS: Objection to form and
18:18:33 12 foundation.
18:18:34 13 THE WITNESS: Not specifically. I
18:18:36 14 do recall thinking for some reason that they
18:18:40 15 knew about it, but I don't remember why I
18:18:42 16 think that.
18:18:43 17 BY MR. GLUCKOW:
18:18:43 18 Q. As you sit here today, you believe
18:18:45 19 the underwriters were aware of the Callaway 10-K
18:18:49 20 disclosure as part of the due diligence process?
18:18:54 21 MR. LEWIS: Objection;
18:18:55 22 mischaracterizes his testimony.
18:18:56 23 THE WITNESS: I think that -- as
18:18:58 24 best I recall, I remember thinking that they
18:19:01 25 were, but like I said, I don't remember why I

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B483

R. ALAN MILLER

Page 304

18:19:03 1 think that.
18:19:04 2 BY MR. GLUCKOW:
18:19:04 3 Q. You agree with the last sentence of
18:19:05 4 Mr. Necarsulmer's F, each factual situation is
18:19:08 5 different and the underwriters must evaluate
18:19:11 6 appropriate disclosure on an individual basis,
18:19:14 7 correct?
18:19:14 8 MR. LEWIS: Objection, form and
18:19:16 9 foundation.
18:19:16 10 THE WITNESS: Sure; I presume he's
18:19:17 11 talking about an individual company basis.
18:19:19 12 Sure, that makes sense.
18:19:20 13 BY MR. GLUCKOW:
18:19:20 14 Q. Do you agree with this statement:
18:19:22 15 The underwriters made their main inquiry concerning
18:19:26 16 gray marketing in the due diligence meetings in April
18:19:31 17 1998?
18:19:31 18 MR. LEWIS: Objection to form,
18:19:33 19 foundation.
18:19:45 20 THE WITNESS: I don't believe I have
18:19:49 21 an opinion on that.
18:19:50 22 BY MR. GLUCKOW:
18:19:50 23 Q. Explain what you mean by that.
18:19:59 24 MR. LEWIS: Objection.
18:20:01 25 THE WITNESS: I haven't attempted to

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B484

R. ALAN MILLER

Page 305

18:20:04 1 determine or rank the level of inquiry that
18:20:09 2 they made in such a fashion that I would make
18:20:12 3 a statement that way. That does appear to be
18:20:16 4 when the topic arose. Subsequent to that, I
18:20:21 5 didn't see any indication that there was
18:20:23 6 independent investigation done of that topic.
18:20:28 7 It ended up not appearing in the prospectus,
18:20:35 8 so I don't have any reason to not think that
18:20:36 9 was the case, but I also don't -- I have not
18:20:40 10 looked into that as an issue in itself to be
18:20:42 11 able to say it that way; I wouldn't have
18:20:45 12 thought of putting it that way. I also don't
18:20:48 13 have any reason to question it. I haven't
18:20:51 14 seen any indication to the contrary.

18:20:52 15 BY MR. GLUCKOW:

18:20:52 16 Q. Do you know whether there were
18:20:53 17 discussions concerning the gray marketing issue
18:20:56 18 between the underwriters and Adams' management in
18:20:59 19 June 1998?

18:21:01 20 MR. LEWIS: Objection to form,
18:21:03 21 foundation.

18:21:04 22 THE WITNESS: Yeah, I think we
18:21:06 23 discussed that briefly earlier in connection
18:21:08 24 with the Hoffman letter, was what I remember
18:21:10 25 that being about, in June.

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B485

R. ALAN MILLER

Page 306

18:21:14 1 BY MR. GLUCKOW:
18:21:14 2 Q. Do you know whether there were any
18:21:16 3 discussions between the underwriters and Adams'
18:21:19 4 management concerning gray marketing or Costco in
18:21:22 5 connection with the Adams' press release in early June
18:21:26 6 concerning the Costco issue?
18:21:27 7 MR. LEWIS: Object to the form.
18:21:29 8 THE WITNESS: Again, I recall that
18:21:30 9 there was some discussion about that in
18:21:33 10 connection with the Costco issue as presented
18:21:36 11 in the press release and limited to that as
18:21:39 12 opposed to the overall problem of gray
18:21:43 13 marketing and sale of clubs through Costco
18:21:44 14 and the implications that that had for the
18:21:44 15 company.
18:21:47 16 BY MR. GLUCKOW:
18:21:47 17 Q. What's the basis for your last
18:21:49 18 answer?
18:21:49 19 A. My understanding of the conversation
18:21:51 20 -- the conversations that occurred around the Hoffman
18:21:56 21 letter with respect to addressing the SEC's inquiry
18:22:01 22 about whether the issue discussed in the Hoffman
18:22:06 23 letter had been investigated or examined by the
18:22:13 24 company according to materiality standard.
18:22:17 25 MR. LEWIS: We have to shut it down.

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B486

R. ALAN MILLER

Page 307

18:22:19 1 at this point. We're just at the time
18:22:22 2 lengths -- we're way past. This was
18:22:26 3 scheduled in this fashion at your guy's
18:22:28 4 request. There was no anticipation of going
18:22:30 5 after six o'clock on a Friday afternoon. We
18:22:33 6 all have different plans and travel plans.

18:22:36 7 I have one question, possibly the
18:22:39 8 famous one question, for Mr. Miller to get on
18:22:44 9 the record before we terminate.

18:22:45 10 MR. GLUCKOW: I'm going to object to
18:22:47 11 your shutting down the deposition because I
18:22:49 12 have not finished my examination, and I will
18:22:51 13 reserve all my rights.

18:22:54 14 MR. COLLINS: Any idea how much
18:22:55 15 more? We've been through this before and
18:22:57 16 asked you that question.

18:22:59 17 MR. GLUCKOW: Part of the problem is
18:23:03 18 every time I ask more questions, I'm getting
18:23:05 19 new opinions from the witness that are not
18:23:07 20 reflected in his written opinions in the
18:23:10 21 case.

18:23:10 22 MR. LEWIS: Because you're asking
18:23:12 23 him for them, you're asking what opinions he
18:23:13 24 may have formed aside of the opinions that he
18:23:18 25 has been engaged to express, and so if you

R. ALAN MILLER

Page 308

18:23:22 1 keep asking someone for views they have, it's
18:23:25 2 not going to be surprising if they have
18:23:25 3 views.

18:23:29 4 MR. GLUCKOW: If you were willing to
18:23:31 5 tell me he isn't going to offer any opinions
18:23:32 6 concerning the underwriters' due diligence
18:23:32 7 beyond that which is contained in his written
18:23:35 8 reports, I told you a long time ago this
18:23:38 9 could have been completed much sooner, but
18:23:38 10 you won't give me that, and because you won't
18:23:40 11 give me that, I need to know what opinions he
18:23:42 12 has formed on that topic.

18:23:44 13 MR. LEWIS: You still haven't
18:23:45 14 answered Todd's question of how much longer
18:23:48 15 do you have to go. We're talking about
18:23:50 16 travel arrangements at this point for people,
18:23:52 17 including the witness.

18:23:55 18 MR. GLUCKOW: Quite honestly, based
18:23:56 19 on this last exchange, I think I have
18:23:59 20 probably another half an hour, at least.

18:24:04 21 MR. COLLINS: Why don't you proceed
18:24:07 22 with your questioning.

18:24:10 23 BY MR. LEWIS:

18:24:11 24 Q. Mr. Miller, aside from the opinions
18:24:15 25 that have been expressed in your various reports about

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B488

ACKNOWLEDGMENT OF DEPONENT

I, R. ALAN MILLER, do hereby certify that I have read the foregoing pages and that the same is a correct transcription of the answers given by me to the questions therein propounded except for the corrections or changes in form or substance, if any, noted in the attached Errata Sheet.

9/22/06
Date

R. Alan Miller
Signature

Corrections to Deposition Transcript of R. Alan Miller IN RE ADAMS GOLF INC. SECURITIES LITIGATION

<u>Page</u>	<u>Line</u>	<u>Now Reads</u>	<u>Should Read</u>	<u>Reason</u>
19	7, 8	to understanding the	to the understanding	mistranscribed
19	13,14	of understanding the	of the understanding	mistranscribed
20	20	forms	forums	mistranscribed
32	3	responsal	response or	mistranscribed
53	24	and	in	mistranscribed
54	14	previous time periods	that day	correction
114	21	are subject	are not subject	mistranscribed
130	1	Prompting	Promoting	mistranscribed
133	23	constrain	construct	mistranscribed
178	24	advisor	advice on	mistranscribed
207	12	THE WITNESS:	BY MR. BESSETTE:	mistranscribed
242	14	complaint	prospectus	mistranscribed
272	10	source	sorts	mistranscribed
285	4	correct.	correct, with respect to the corporate finance personnel.	clarification

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: ADAMS GOLF, INC. :

SECURITIES LITIGATION :

X

The Expert Discovery Deposition of
CHRISTIANA OCHOA, taken in the above-entitled case
before KATHLEEN J. PACULT, a Certified Shorthand
Reporter within and for the County of Cook, State of
Illinois, taken pursuant to the provisions of the
Federal Rules of Civil Procedure and the Rules of
the Supreme Court thereof pertaining to the taking
of depositions for the purpose of discovery, taken
on the 4th day of August 2006, at the hour of
9:30 a.m., at 6100 North River Road, Rosemont,
Illinois.

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Defendants.

1 other conversations after that.

2 Q. In any of those -- well, strike that.

3 When Mr. Collins re-contacted you
4 in the summer of this year and you were entertaining
5 the thought of becoming an expert for the plaintiffs
6 in this case, did you have to seek permission or
7 consult with anybody at the university about whether
8 you could do that or not?

9 A. I don't think I actually had to seek
10 permission, but I did check to see whether I had to
11 seek permission. I spoke with my -- with the
12 associate dean at my law school. The dean at my law
13 school was out of town and he made clear to me that
14 it wasn't necessary to speak with her as well. I
15 asked him what the issues -- what the constraints
16 were on my serving as an expert, and he gave me
17 those constraints.

18 Q. Now, you had not served as an expert
19 witness in any sort of litigation prior to this
20 engagement, is that right?

21 A. That's correct.

22 Q. Were you concerned during the process
23 of talking with Mr. Mara or Mr. Collins about
24 whether you would qualify as an expert witness?

1 A. I wanted to make sure that the
2 qualifications that I do possess were adequate and
3 sufficient for their needs.

4 Q. How did you do that?

5 A. I made sure that they were entirely
6 aware of the entirety of my knowledge of the gray
7 market, my expertise in the gray market, and my
8 expertise in other matters as well, and let them
9 make their decision about that.

10 Q. Did you express concern to the
11 assistant dean or anybody at the university when you
12 were inquiring about the constraints about whether
13 or not you qualified as an expert?

14 MR. COLLINS: Foundation.

15 You may answer.

16 BY THE WITNESS:

17 A. No.

18 BY MR. BESSETTE:

19 Q. Did you consult with anybody -- other
20 than the plaintiffs in this case, Mr. Collins or Mr.
21 Mara, about whether -- well, did you express to
22 anybody, other than Mr. Collins or Mr. Mara,
23 thoughts about whether you qualified as an expert in
24 this case?

1 You are currently an associate
2 professor of law at Indiana University School of
3 Law?

4 A. That's correct.

5 Q. And as I understand it, you say in the
6 report or in your resume that your duties are
7 divided into three sort of buckets or categories?

8 A. Yes.

9 Q. Okay. Would you tell me what those
10 are, please?

11 A. Those are teaching, research and
12 service.

13 Q. Okay. What are your primary duties
14 with respect to the research prong of your duties?

15 A. To research and publish my work.

16 Q. And what work?

17 A. I guess I am curious about what you
18 mean by what work.

19 Q. I just want to understand what you
20 meant, research and publish your work.

21 A. Yeah. It is law professors typically
22 write legal scholarship articles, they are published
23 in various law journals, as well as other locations.
24 And we are expected to produce in that way.

1 of that course with that section in it was on the
2 internet and that's how the plaintiff's lawyers
3 found you?

4 A. That's what I understand.

5 Q. Okay. Now, explain to me, this course
6 that you teach, international business transactions,
7 is that a course for one semester?

8 A. Yes.

9 Q. And this is at the law school?

10 A. Correct.

11 Q. Which level of student?

12 A. Upper level students.

13 Q. So second and third years?

14 A. Correct. And also graduate students.

15 Q. What are the -- I mean, is there a
16 textbook or multiple textbooks that you use to teach
17 that class?

18 A. I teach from one textbook.

19 Q. Which one is that?

20 A. It's Folsom, Gordon and Spanogle
21 International Business Transaction. Folsom is
22 F-o-l-s-o-m, Gordon is Gordon, and Spanogle I
23 believe is S-p-a-n-g -- S-p-a-n-o-g-l-e.

24 Q. And is there one or more chapters in

1 that textbook that deals with gray marketing?

2 A. There is one chapter that deals with
3 counterfeiting and gray marketing. Let me rephrase.
4 There are chapters in the book, the chapters are
5 divided into what the authors call problems or
6 sections, and one of those is devoted to gray
7 marketing and counterfeiting.

8 Q. Okay. And how extensive is that
9 section or chapter? In other words, how many pages?

10 MR. COLLINS: The document speaks for
11 itself, and as you know, was produced.

12 BY THE WITNESS:

13 A. I don't remember exactly the page
14 length.

15 BY MR. BESSETTE:

16 Q. Did you select that course book for
17 that class?

18 A. I did.

19 Q. How did you select that? What was
20 your criteria?

21 A. I used a few criteria. I selected
22 it -- I taught international business transactions
23 the first year that I taught at the law school, and
24 went through a process that a new professor

1 typically goes through in selecting a course book
2 and choosing that one.

3 Q. Okay. And would you just explain for
4 the jury what that process is?

5 A. Sure. That process includes reviewing
6 the world of possible international business
7 transactions textbooks, looking at them seeing which
8 ones has materials that you think are presented
9 clearly, neatly, in a way that is well organized,
10 easy to understand and will capture the students'
11 attention.

12 In addition, I spoke with other
13 professors who I knew had taught in the area before
14 and asked them about their experiences in teaching
15 international business transactions and the
16 textbooks that they had used and the problems and
17 the benefits that they had encountered with each of
18 them.

19 Q. Now, only one section in that course
20 book is devoted to gray marketing. Do I have that
21 right?

22 A. Yes.

23 Q. And do the materials in that section
24 deal with the golf industry exclusively or just sort

1 A. They have been changed over the course
2 of the time that I have taught the class. I have
3 now taught the class three times. Each year I
4 believe they have been slightly different, those
5 materials have been slightly different. So in
6 preparation for teaching each year, I reevaluate
7 and -- I reevaluate the materials I have used before
8 and add or subtract materials that were included.

9 Q. So the course book itself doesn't have
10 a section on gray materials as it deals with the
11 golf industry, it is the supplemental materials. Do
12 I understand that right?

13 A. It is has a section on the gray
14 market. It does not have a section on the gray
15 market in relation to the golf industry.

16 Q. Okay. And when you first started
17 teaching, is it your understanding that in the first
18 year, which I guess we'll get to here, '03 maybe,
19 you provided supplemental materials that focused on
20 gray marketing in the golf industry?

21 MR. COLLINS: Asked and answered.

22 Go ahead.

23 BY THE WITNESS:

24 A. In the first year that I taught the

1 course, I did include those materials, yes.

2 BY MR. BESSETTE:

3 Q. I'm sorry, you did?

4 A. I did include those materials, yes.

5 Q. Okay. Now, where did you find those
6 materials?

7 MR. COLLINS: And we're asking
8 specifically with regard to the first year?

9 MR. BESSETTE: Right.

10 BY THE WITNESS:

11 A. The first year that I taught the
12 class, again, I followed pretty standard practice
13 for new professors. I used materials that a person
14 who had taught international business transactions
15 introduced me to.

16 BY MR. BESSETTE:

17 Q. And the supplemental materials that
18 you used starting in '03 and continuing to the
19 present have been produced?

20 A. Yes. I believe. And materials that I
21 taught the last time that I taught have been
22 produced.

23 Q. Do you have in your possession the
24 materials starting from the first time you taught to